

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AARON SMITH,)	
)	
Plaintiff,)	
)	
v.)	No. 1:21-cv-00050-JRS-TAB
)	
MORRIS,)	
C. JOHNSON,)	
)	
Defendants.)	

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Aaron Smith is suing two Indiana correctional officers under the Eighth Amendment for failing to protect him from another prisoner's assault by bodily waste. The defendants move for summary judgment. They argue that the assault by bodily waste was not an objectively serious harm, that they did not have actual knowledge that Smith was at risk of assault, that defendant Morris was not personally involved in the incident, and that they are entitled to qualified immunity. These arguments do not provide a basis to grant summary judgment, and the motion is therefore **DENIED**.

**I.
SUMMARY JUDGMENT STANDARD**

Parties in a civil dispute may move for summary judgment, which is a way of resolving a case short of a trial. *See* Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there is no genuine dispute as to any of the material facts, and the moving party is entitled to judgment as a matter of law. *Id.*; *Pack v. Middlebury Comm. Sch.*, 990 F.3d 1013, 1017 (7th Cir. 2021). A "genuine dispute" exists when a reasonable factfinder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material facts" are those that might affect the outcome of the suit. *Id.*

When reviewing a motion for summary judgment, the Court views the record and draws all reasonable inferences from it in the light most favorable to the nonmoving party. *Khungar v. Access Cmty. Health Network*, 985 F.3d 565, 572-73 (7th Cir. 2021). It cannot weigh evidence or make credibility determinations on summary judgment because those tasks are left to the factfinder. *Miller v. Gonzalez*, 761 F.3d 822, 827 (7th Cir. 2014). The Court is only required to consider the materials cited by the parties, *see* Fed. R. Civ. P. 56(c)(3); it is not required to "scour every inch of the record" for evidence that is potentially relevant. *Grant v. Tr. of Ind. Univ.*, 870 F.3d 562, 573-74 (7th Cir. 2017).

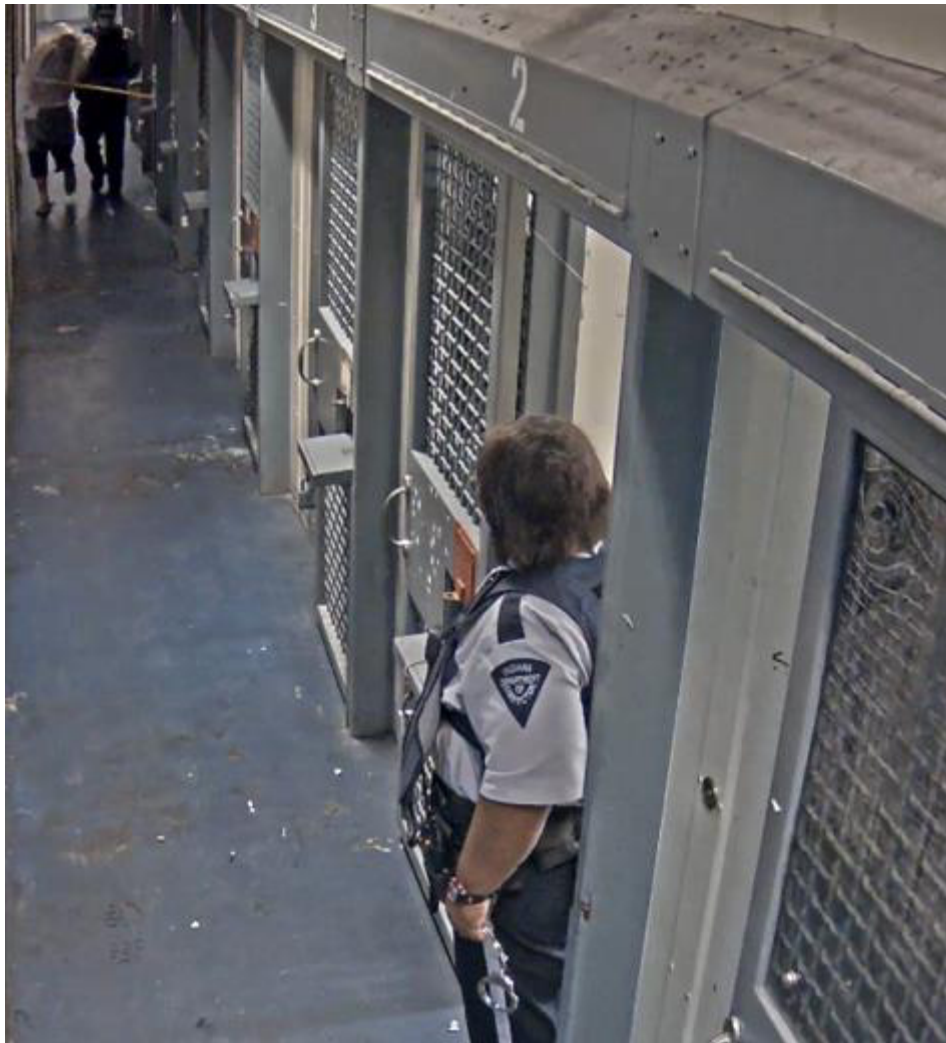
"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

II. FACTUAL BACKGROUND

The following events occurred at Pendleton Correctional Facility, in G-Cell House, Range 5D, on September 29, 2020. (Docket Entry 1). This was a solitary confinement unit where the plaintiff, Aaron Smith, was confined. (*Id.*).

Defendants Morris and Johnson were escorting prisoners on Range 5D to the showers. Morris escorted prisoners one-by-one from the front end of the range, and Johnson escorted prisoners one-by-one from the back end of the range.

Johnson escorted prisoner Robert Wright to the showers. As they walked down the range, they passed the cell of prisoner Devin Brown, who took this opportunity to assault Wright with a broomstick that he had fashioned into a spear. Morris looked down the range and witnessed the assault.



(Docket Entry 56, Manual Filing, at 00:42:43).

Johnson was able to grab the broomstick, confiscate it from Brown, and continue escorting Wright to the showers.



(*Id.* at 00:42:50).

The defendants did not remove Brown from his cell. (*Id.*; Docket Entry 50-3 at 22-23). Instead, they had a brief discussion and then continued escorting prisoners to the shower. (*Id.*).

About seventeen minutes after the broomstick assault, Johnson removed Smith from his cell and began escorting him to the showers. (Docket Entry 56 at 01:00:00). Johnson was "kind of laughing" and asked Smith, "What did you guys do to him?" (Docket Entry 50-3 at 24). Smith answered, "Look, I don't know what's going on with him, but he better do nothing to me." (*Id.*). Johnson replied, "Oh, I got you." (*Id.*).

They walked down the range, and Johnson stood between the row of cells and Smith. (*Id.* (Smith: "I was trying to make it to where Sergeant Johnson was in the middle between the cells and the outer range.")); (Docket Entry 56 at 01:01:05). As they neared Brown's cell and were about two or three cells away, Smith saw Brown stick a bowl full of urine and feces through his cuff port. (Docket Entry 50-3 at 26-27).

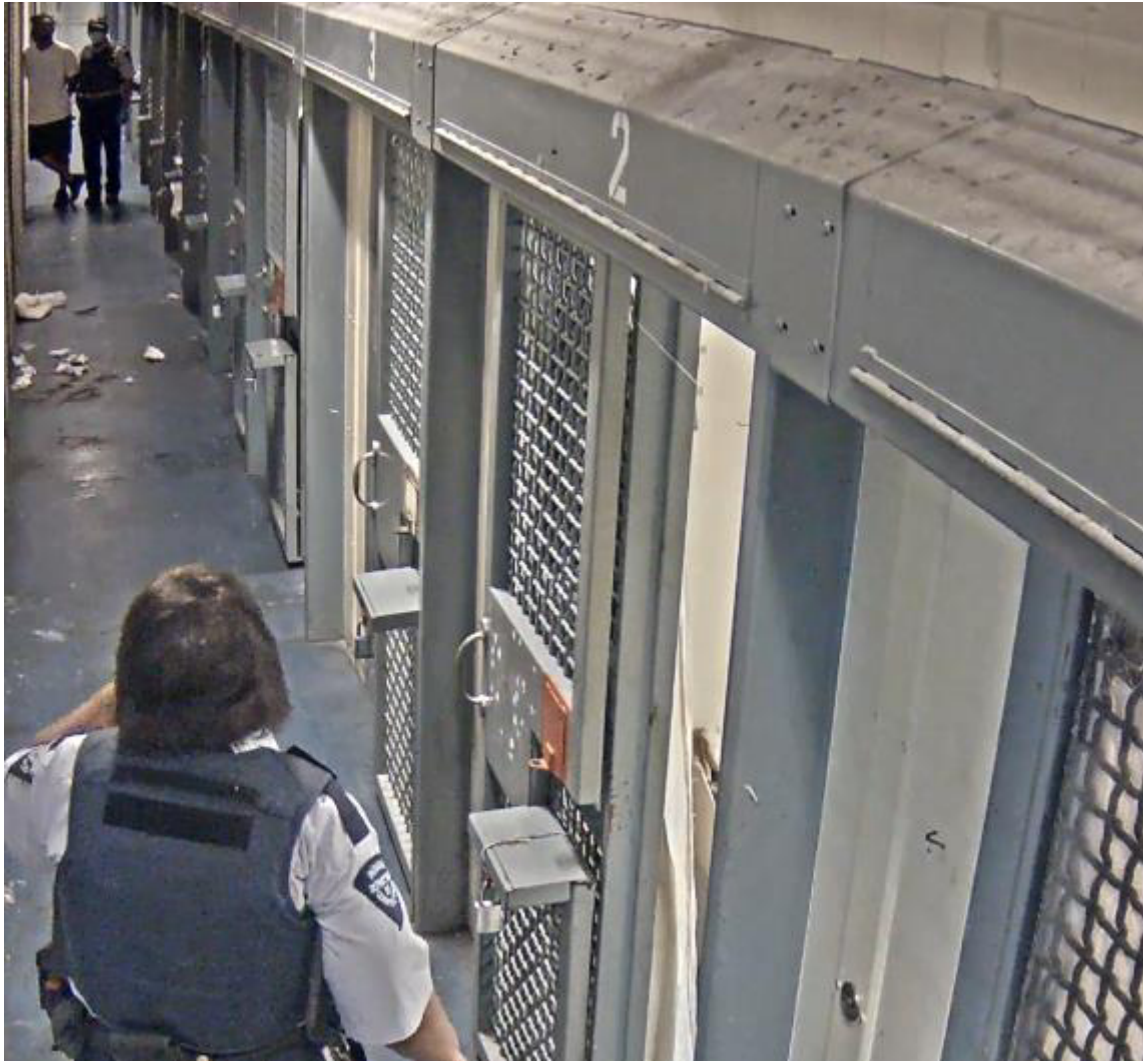
Johnson and Smith stopped. Smith told Johnson, "Hey, man, you see he got this bowl of feces, man. I don't want him to throw it at me. Take me through the back door. Like, you see what he's doing, right?" (*Id.* at 27). Johnson answered, "Yeah, I did, but what you want me to do about it[?]" Smith said, "Hey, man, Sergeant Morris is down here. You see she's at the end of the range, man. Tell her – call her on the radio and get her to come unlock this back door. You've got to do something about this dude with the bowl." (*Id.*).

While Johnson kept them in a holding pattern, Smith tried to reason with Brown: "I was like, 'Hey, I'm just trying to go to the shower. Just let me go past. I ain't – I don't know you. I ain't got nothing to do with what you got going on. Just let me go to the shower.' And he was like, 'Nah, you not coming past here.'" (*Id.* at 27-28).



(Docket Entry 56 at 01:00:11) (holding pattern) (bowl sticking through cuff port).

About thirty seconds later, Morris appeared on the range. On the surveillance video, she appears to communicate with Johnson about the situation with Brown.



(*Id.* at 01:00:42).

About a minute after that, as Morris began unlocking another cell, Brown flung urine and feces at Johnson and Smith, hitting both men.



(*Id.* at 01:01:47); (Docket Entry 50-3 at 28).

Smith turned, and Johnson partially shielded Smith with his arm and body.



(Docket Entry 56 at 01:01:47).

After the assault, Johnson walked Smith toward the back of the range away from Brown. (*Id.*); (Docket Entry 50-3 at 28). Morris eventually followed and unlocked the back door. (*Id.*). All three then exited the range.



(Docket Entry 56 at 1:08:53).

According to Smith, this back exit provided an alternative path to the showers. (Docket Entry 50-3 at 33). Morris was the superior officer, and she was the only officer who could have unlocked the back door. (*Id.* at 40-41). Smith also testified that Pendleton Correctional Facility has protective equipment that could have blocked Brown's cell and provided Smith with safe passage, but Johnson and Morris did not attempt to use this equipment before the assault. (*Id.* at 42) ("Or they could've – they could've got – it's a shield thing they got. It's like this little shield thing that's on wheels. They can place it on the range to walk past inmates' cells who are known to throw urine, feces, and whatever else they be throwing.").

Smith testified that he was "covered in feces," that it hit him in the face, and that he ingested some of the feces during the assault. (Docket Entry 50-3 at 50-53). He claims to suffer anxiety and post-traumatic stress disorder because of the assault. (*Id.*).

III. DISCUSSION

A. Deliberate Indifference Standard

The Eighth Amendment requires prison officials to take reasonable measures to guarantee the safety of inmates and to protect them from harm at the hands of others. *Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994). To prevail on a failure to protect claim, the plaintiff must prove (1) that he was at a substantial risk of serious harm that ultimately occurred, and (2) that the defendant was subjectively aware that he was at a substantial risk of harm and failed to make reasonable efforts to protect the plaintiff from this substantial risk. *Id.* at 832-34.

To satisfy the first prong of a failure to protect claim, the plaintiff must demonstrate that he was "incarcerated under conditions posing a substantial risk of serious harm," and that he ultimately experienced that harm. *Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005). "[T]he deprivation alleged must be objectively, sufficiently serious," amounting to a "denial of the minimal civilized measure of life's necessities." *Id.* The question is whether prison officials exposed a prisoner to a sufficiently substantial "risk of *serious damage to his future health*." *Id.* (emphasis removed). A beating suffered at the hands of a fellow inmate constitutes serious harm, as "[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 910-11 (internal quotations removed).

To satisfy the second prong of a failure to protect claim, the plaintiff must demonstrate that the defendant had actual knowledge of the substantial harm and acted with deliberate indifference to that harm. *Id.* at 913. Deliberate indifference is a mental state that lies between negligence and purpose. *Farmer*, 511 U.S. at 836. "The point between these two poles lies where 'the official knows of and disregards an excessive risk to inmate health or safety' or where 'the official [is] both aware of facts from which the inference could be drawn that a substantial risk of serious harm

exists, and . . . draw[s] the inference." *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008) (quoting *Id.* at 837). "In failure to protect cases, a prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." *Gidarisingh v. Pollard*, 571 F. App'x 467, 470 (7th Cir. 2014) (quoting *Pope v. Shafer*, 86 F.3d 90, 92 (7th Cir. 1996)).

B. Analysis

1. Eighth Amendment Liability

Both defendants argue that Brown's assault on Smith with urine and feces was not an objectively serious harm under the Eighth Amendment. (Docket Entry 51 at 7-8). They also argue that they did not have actual knowledge that Smith was at risk of being assaulted. (*Id.* at 9-10). Morris alone argues that she was not personally involved in this incident and therefore cannot be held liable. (*Id.* at 6-7). The Court will address each argument in turn.

First, it is well-established that correctional officers have an Eighth Amendment duty to protect prisoners from physical assault. *See Farmer*, 511 U.S. at 832–33. The Seventh Circuit has previously held, in an analogous case, that fact issues precluded summary judgment where there was evidence that a correctional officer failed to protect a prisoner from another prisoner who threw feces in his face. *Harris v. Molinero*, 803 F. App'x 1, 4 (7th Cir. 2020). A reasonable jury could find that being hit in the face and forced to ingest urine and feces is an objectively serious harm and that correctional officers have a duty to protect inmates from such harm. Accordingly, the motion for summary judgment on this ground is **DENIED**.

Second, the evidence shows that both Johnson and Morris were aware that Smith was at a substantial risk of assault. They had witnessed Brown's assault on Wright minutes earlier by a broomstick that he had fashioned into a spear. (Docket Entry 56 at 00:42:43). Then, Johnson saw

Brown stick a bowl of urine and feces through his cuff port and heard him threaten to assault Smith. (Docket Entry 50-3 at 27-28). Johnson discussed the issue of assault with Smith, and he judged the threat to be substantial enough to stop for over a minute and confer with Morris. (*Id.*); (Docket Entry 56 at 01:00:11 – 00:01:42).

For reasons that are not clear from the record, Johnson did not back away from Brown's cell after Brown threatened to assault Smith with urine and feces, choosing instead to maintain a holding pattern two to three cells away. It is equally unclear why Morris chose to continue with the task of escorting prisoners to the shower after conferring with Johnson about the situation. Morris states that she "has no recollection of this incident" and has not provided an explanation for her actions. (Docket Entry 70 at 127). Johnson states, "Before I could get Aaron Smith turned around, Devin Brown tossed the feces down range from approximately four cells away." (*Id.* at 118). Of course, Johnson's explanation is belied by the surveillance video, which shows Johnson and Smith in a prolonged holding pattern with ample time to turn back before the assault.

A jury may find that the defendants' nonchalance toward Brown is evidence that they lacked a subjective belief that Smith was at a substantial risk of assault. (*See* Docket Entry 51 at 10) ("Defendant Johnson also exposed himself to the risk of being assaulted with feces by walking along the east side of the range toward Brown's cell and standing in close proximity to Brown's cell for approximately two minutes without attempting to shield himself. It is highly improbable that a prison official would knowingly expose themselves to such a risk"). A jury might also find that this nonchalance reflected indifference to Smith's safety. Taking the evidence in the light most favorable to Smith, the Court finds that this incongruity does not entitle the defendants to summary judgment, and their motion on this ground is **DENIED**.

Third, the evidence supports a reasonable finding that Morris was personally involved in this incident. Smith is suing the defendants for constitutional violations under 42 U.S.C. § 1983. "Individual liability under § 1983 requires personal involvement in the alleged constitutional deprivation." *Colbert v. City of Chicago*, 851 F.3d 649, 657 (7th Cir. 2017) (cleaned up) (citing *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983) ("Section 1983 creates a cause of action based on personal liability and predicated upon fault. An individual cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation.... A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary.")).

Morris was the only correctional officer besides Johnson who was on the range during this incident. She had witnessed Brown assault Wright with a broomstick minutes earlier, conferred with Johnson about Brown and the bowl of feces before the assault on Smith, and was on the range, just a few steps away from Brown, during the assault. There is evidence that she could have potentially taken action to protect Smith from assault (*i.e.*, by unlocking the back door to the range, calling for protective equipment, or calling for additional correctional officers) but did nothing. This is not to say that her conduct necessarily satisfies all the elements for an Eighth Amendment failure-to-protect claim beyond any reasonable factual determination, but her argument that she had no personal involvement in this incident is unpersuasive at this stage. Accordingly, Morris' motion for summary judgment on this ground is **DENIED**.

2. Qualified Immunity

i. Legal Standard

"A state official is protected by qualified immunity unless the plaintiff shows: (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at

the time of the challenged conduct." *Reed v. Palmer*, 906 F.3d 540, 546 (7th Cir. 2018) (internal quotations and citations omitted). "If *either* inquiry is answered in the negative, the defendant official' is protected by qualified immunity." *Id.* (quoting *Green v. Newport*, 868 F.3d 629 (7th Cir. 2017)).

To make a qualified immunity determination, the Court must "(1) determine whether the plaintiff has alleged the deprivation of an actual constitutional right and (2) if so, determine whether that right was clearly established at the time of the alleged violation." *Sparing v. Village of Olympia Fields*, 266 F.3d 685, 688 (7th Cir. 2001) (citing *Saucier v. Katz*, 533 U.S. 194 (2001) (citations omitted)). Once raised, the plaintiff, not the defendant, carries the burden of overcoming the affirmative defense. *Sparing*, 266 F.3d at 688 (citing *Spiegel v. Cortese*, 196 F. 3d 717 (7th Cir. 1999)).

This Court's analysis must follow the Supreme Court's rulings. In this regard, *Mullenix v. Luna*, 577 U.S. 7 (2015) is instructive. The Supreme Court explained:

A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law.

We have repeatedly told courts ... not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.

Id. at 11-12 (internal citations and quotation marks removed).

ii. Analysis

In raising qualified immunity, the defendants do not argue that their attempts to protect Smith from assault were arguably constitutional (that is to say, they do not argue that keeping him in a holding pattern near Brown's cell, standing between Smith and Brown, and partially shielding Smith with Johnson's body during the assault; but failing to remove Brown from the range, take Smith through the back door, call for backup, or call for protective equipment was arguably within the bounds of acceptable conduct under the Eighth Amendment).

Instead, they focus only on whether it was clearly established that the assault by bodily waste was an objectively serious harm under the Eighth Amendment. (Docket Entry 51 at 5-6). They argue that there is not a "clearly established right for offenders to be protected from a brief, minor exposure to human feces." (*Id.* at 5). They represent that Smith was "exposed to such an insignificant amount of feces that it was not visible on the surveillance footage." (*Id.* at 6). And that he was "allowed to shower within 7 minutes" of the exposure. (*Id.*).

The defendants' qualified immunity argument does not align with the facts of this case. First, Smith was not merely "exposed" to feces; he was violently assaulted by another prisoner's urine and feces in a pre-announced attack. The cases the defendants cite in support of their qualified immunity argument all involve fact patterns where there was human waste somewhere in the prisoner's cell, not on the prisoner's face or in his mouth and stomach. (*Id.* at 5-6) (citing *Thomas v. Blackard*, 2 F.4th 716, 720 (7th Cir. 2021); *Vinning-El v. Long*, 482 F.3d 923, 924 (7th Cir. 2007); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989); *Morris v. Ley*, 331 F. App'x 417, 419 (7th Cir. 2009); *Wheeler v. Walker*, 303 F. App'x 365, 368 (7th Cir. 2008)). And even then, each of these cases involve appellate determinations that the exposure was an objectively serious harm, meaning that it is clearly established that even *indirect* exposure to human waste can be an

objectively serious harm under the Eighth Amendment. *See Thomas*, 2 F.4th at 720-21 (exposure was objectively serious); *Vinning-El*, 482 F.3d at 923-25 (reversing summary judgment); *Johnson*, 891 F.2d at 139-40 (reversing summary judgment); *Morris*, 331 F. App'x at 420-21 (reversing summary judgment); *Wheeler*, 303 F. App'x at 368 (allegations sufficient to state a claim).

Second, the defendants' representation that there was "such an insignificant amount of feces that it was not visible on the surveillance footage" is not correct. (*Supra* at 7) (citing Docket Entry 56 at 01:01:47). Further, terms like "insignificant," "minor," and "brief" are relative in this context. A certain amount of feces may seem "insignificant" when it is on the wall or the floor. But that same amount of urine and feces might be quite significant when it is flung onto a person's face and ingested into their mouth and stomach.

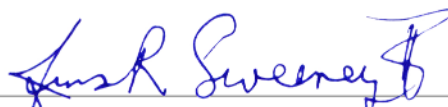
A jury might reasonably conclude that the "exposure" to urine and feces in this case was neither "insignificant," "minor," nor "brief." Accordingly, the motion for summary judgment on this ground is **DENIED**. This ruling does not preclude the defendants from presenting a qualified immunity argument at trial.

IV. CONCLUSION

The defendants' motion for summary judgment, Docket Entry [49], is **DENIED**. Given the challenges inherent in late-stage litigation, Smith may benefit from the assistance of counsel. The **CLERK IS DIRECTED** to send him a motion for assistance recruiting counsel form with his copy of this Order. The defendants are **ORDERED** to file an updated Notice Regarding Settlement Conference within **21 DAYS OF THE ISSUANCE OF THIS ORDER**.

IT IS SO ORDERED.

Date: 06/05/2023



JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution:

AARON SMITH
167146
MIAMI - CF
MIAMI CORRECTIONAL FACILITY
Inmate Mail/Parcels
3038 West 850 South
Bunker Hill, IN 46914-9810

Carlton Wayne Anker
Lewis and Wilkins LLP
anker@lewisandwilkins.com

Eric Ryan Shouse
Lewis And Wilkins LLP
shouse@lewisandwilkins.com